Supreme Court, U.S.
FILED
OCT 11 1994
CLERK

Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANK SECURITIES, INC.

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REPLY BRIEF OF PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.

NationsBank of North Carolina, N.A. and its wholly-owned brokerage subsidiary, NationsBanc Securities, Inc. (collectively, "NationsBank"), submit this reply brief in response to the brief of Respondent, Variable Annuity Life Insurance Co. ("VALIC") and its supporting *amici*.[1] In its opening brief NationsBank demonstrates that the Comp-

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[1] NationsBank Corporation is the parent company of NationsBank of North Carolina, N.A. NationsBank Community Development Corporation and NationsBank Housing Fund Investment Corporation are partially owned subsidiaries of NationsBank of North Carolina, N.A.

troller of the Currency ("Comptroller") engaged in reasoned decisionmaking in approving NationsBank's request to sell, as agent, all forms of fixed and variable annuities to its customers ("Comptroller's Approval") and that the Comptroller's interpretations of the National Bank Act were permissible and consistent with the purposes and structure of that Act. These arguments are not repeated in this Reply Brief. Instead, NationsBank limits its responses here to the selective legal contentions raised by VALIC in its brief.

I. THE POWER TO SELL FIXED AND VARIABLE ANNUITIES IS DERIVED FROM A NATIONAL BANK'S AUTHORITY TO EXERCISE "ALL SUCH INCIDENTAL POWERS AS SHALL BE NECESSARY TO CARRY ON THE BUSINESS OF BANKING" AS WELL AS TO ENGAGE IN THE BUSINESS OF SELLING SECURITIES AS AGENT.

Respondents' brief continues to advance the fatally flawed argument they have maintained in the courts below: that national banks and their operating subsidiaries do not have the power to sell as agent fixed and variable annuities. As demonstrated in our opening brief, the authority of national banks to sell fixed and variable annuities is derived from two sources. First, with respect to the sale of both fixed and variable annuities, the Comptroller's Approval states that such authority is based upon the provisions of the National Bank Act granting national banks "all such incidental powers as shall be necessary to carry on the business of banking . . . ." 12 U.S.C. § 24 Seventh (first sentence) ("Section 24 Seventh"). Second, at least with respect to the sale of variable annuities, the Comptroller's staff has acknowledged since 1985 the power to engage in such activity based on the Glass-Steagall Act, which is codified as the second sentence of 12 U.S.C. § 24 Seventh.[2] The Glass-Steagall Act empowers national banks

[2] Act of June 16, 1933, ch. 89, 48 Stat. 184.

to engage in the "business of dealing in securities and stock . . . without recourse, solely upon the order, and account of, customers . . . ." The existence of this latter authority was expressly confirmed by the Comptroller in the Comptroller's Approval. NationsBank Pet. App. 37a; NationsBank Br. App. 3a.

With respect to the authority provided by Section 24 Seventh, VALIC contends that the "business of banking" has had a fixed and immutable meaning since the time of the Civil War, when the "business of banking" was not understood to include the sale of annuities. VALIC Br. 36-39. VALIC's basic argument slights numerous relevant decisions of this Court and of the lower courts. These decisions, reflecting the intent of Congress, have construed the "business of banking" dynamically and functionally. *See* NationsBank Br. 26-30. VALIC urges this Court to adopt an unduly narrow construction of the "business of banking," which would effectively deny the Comptroller any meaningful ability to interpret banking powers in a rapidly changing financial services world. Without this necessary regulatory flexibility, national banks will be unable to compete effectively with state-chartered banks and other financial services providers in direct contravention of the will of Congress.

As to the Glass-Steagall authority, VALIC in a footnote incorrectly contends that this case does not present any Glass-Steagall issue. VALIC Br. 48 n.24. That is plainly incorrect. VALIC's complaint in this case broadly seeks injunctive relief "prohibiting [NationsBank] from entering the insurance business by engaging in the sale of fixed and variable annuities." VALIC Compl. ¶ 3, R. 0150.[3] The questions presented by both petitions for certiorari fairly included this issue, and NationsBank's Petition expressly

[3] References to "R. ____" herein are page references to the record on appeal to the court of appeals.

states that the Glass-Steagall Act "is directly at issue in this case." NationsBank Pet. 4 n.3.

A. Congress Intended That the Banking Activities and Services Encompassed by the Incidental Powers Clause Evolve as the Business of Banking Changes to Meet the Needs of the Financial Services Marketplace.

This Court has never subscribed to VALIC's position that Congress intended the "business of banking" to have essentially a fixed and static meaning based upon what was understood to be the "business of banking" in the period prior to 1863. Moreover, simply because Section 24 Seventh, as it was enacted in 1863 and as revised in 1864,[4] was modeled upon Section 18 of the New York Free Banking Act of 1838,[5] it does not follow that particular interpretations given the New York law by the New York courts prior to 1863 somehow were intended by Congress to be subsumed forever into the fabric of the National Bank Act.[6]

For one thing, Congress' objectives in enacting the National Bank Acts of 1863 and 1864 were quite different from those of the New York legislature in 1838. The National Bank Acts were enacted at a time when the national

[4] The statute enacted in 1863 was originally titled the National Currency Act of 1863, Act of February 25, 1863, ch. 58, 12 Stat. 665. This statute was repealed and replaced by the Act of June 3, 1864, ch. 106, 13 Stat. 96. Both statutes have come to be referred to as a "National Bank Act," and will be referred to as such herein. *See* 12 U.S.C. § 38.

[5] 1838 N.Y. Laws 245, 249, ch. 260, § 18. The provision is reprinted at VALIC Br. 36-37 n.18.

[6] Even if the pre-Civil War interpretations given by the New York courts were to be adopted, those interpretations could be read to support the dynamic interpretation of Section 24 Seventh being urged here. *See* discussion of *Curtis v. Leavitt*, 15 N.Y. 9 (1857) in the Brief of the New York Clearinghouse Association as *Amicus Curiae* in Support of Petitioners at 17-18.

government was under severe financial pressures from the war effort, and a national banking system with a uniform national currency was judged to be a financial necessity.[7] In order to encourage the chartering of national banks, Congress believed that it was important that national bank charters be sufficiently attractive to attract potential investors in national banks and to tempt existing state-chartered banks to convert to national charters. As a result, the National Bank Act reflected the overriding national policy of promoting "competitive equality" in banking powers between national banks and state banks as a necessary ingredient for the preservation and promotion of a national banking system. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 564-65 (1934); Emmette S. Redford, *Dual Banking: A Case Study in Federalism*, 31 Law & Contemp. Problems 749, 763 (1966).

The historical origin of Section 24 Seventh is not the only basis for concluding that it was intended to be interpreted in a dynamic manner. The literal language of the statute itself also reflects such dynamism. By using the term "business of banking," Congress tied the interpretation of incidental powers to a term that is purposefully broad and that it understood would inevitably evolve over time to encompass new activities and services as changes occurred in finance and commerce. The term was intended to enable national banks to remain viably competitive.

From the beginning, this Court's decisions have recognized the dynamism of the incidental powers clause and have upheld the provision of new banking services and

[7] *See* Special Message of President Abraham Lincoln to the Congress on Financing the War, Senate Journal, 37th Cong., 3d Sess., 121-22 (Jan. 17, 1863), *reprinted in*, Senate Comm. on Banking and Currency, 88th Cong., 1st Sess., *Federal Banking Laws and Reports, 1780-1912*, at 306-07 (1963).

activities that have "grown out of the business needs of the country." *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 648 (1872) (certification of checks upheld as an incidental power); *see also First Nat'l Bank v. National Exchange Bank*, 92 U.S. 122, 127 (1875) ("The [incidental] powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently.")

At the time Congress adopted the National Bank Act of 1863, it also established the Comptroller of the Currency to administer the national banking and currency system that had been created. 12 U.S.C. § 1 *et seq.* The Comptroller's duties included "enforcement of the banking laws," *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627 (1971), and the comprehensive supervision of the activities of national banks. Accordingly, at the same time as it granted national banks the incidental powers necessary to engage in the business of banking, Congress also created an expert regulator to whom banks and the public appropriately could look to determine what activities and services are, at any given time, reasonably part of, or incidental to, the "business of banking."[8] *See* NationsBank Br. 17-18. This regulatory authority vested in the Comptroller was not without boundaries; rather, this authority had to be exercised in a reasonable manner consistent with the purposes of the National Bank Act. This is precisely what the Comptroller did in this case. The Comptroller carefully articulated a reasoned basis for concluding that the brokerage of annuities was part of the "business of banking." This conclusion was based on the traditional role of national banks as financial intermediaries and upon the close functional similarity between annuities and other financial investment instruments that national banks are authorized to sell. Pet. App. 37a-41a. It is noteworthy that VALIC has not challenged the Comptroller's underlying reasons for concluding that annuities brokerage was part of the business of banking, but rather has relied entirely on the argument that the business of banking was frozen in the Civil War era, as if it were some Brady daguerreotype.

[8] Although originally an opponent of the National Bank Act of 1863, Hugh McCulloch was persuaded by Secretary of the Treasury Salmon P. Chase to become the first Comptroller of the Currency in 1863. Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 731 (1957).

Finally, the very New York courts that VALIC embraced as the authoritative sources of what the National Bank Act means themselves have rejected VALIC's static construction of the "business of banking" under the New York Banking Law. After quoting precisely the same case relied upon so heavily by VALIC, *Curtis v. Leavitt*, 15 N.Y. 9 (1857), the New York Court of Appeals earlier this year stated:

> We have long been mindful that the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service. Our courts must be cognizant of these adjustments in ruling on cases involving interpretation of the Banking Law.

New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't, 82 N.Y.2d 353, 361, 632 N.E.2d 876, 880 (1994) (considering the authority of state-chartered banks to broker fixed and variable annuities).[9] The New York Court of Appeals expressly rejected the insurance industry's contention that the incidental powers clause

[9] Contrary to VALIC's contention, the most recent opinion of the New York Court of Appeals is consistent with the holding of *Curtis v. Leavitt*, 15 N.Y. at 54-59 (state banks can borrow money even though not expressly empowered to do so), and the various supporting opinions, *see id.* at 58 (Comstock, J.) and at 157 (Brown, J.).

was limited to those activities which are necessary to achieve the powers expressly outlined in the New York Banking Law. "Rather, the clause must be construed as an independent, express grant of power, intended to reflect the ever-changing demands of the banking business." 82 N.Y. 2d at 363, 632 N.E. 2d at 881.[10]

B. The Glass-Steagall Act Authorizes National Banks to Sell at Least Some Types of Annuities.

VALIC only tangentially addresses the merits of the contention that the Glass-Steagall Act authorizes national banks to sell at least variable annuities by authorizing national banks to engage in "[t]he business of dealing in securities and stock ... for the account of, customers ...." 12 U.S.C. § 24 Seventh (second sentence). Instead, VALIC contends (VALIC Br. 48 n.24) that this case does not present the issue because the Comptroller's Approval did not find it necessary to rely upon the Glass-Steagall Act in order to "find that brokerage of *fixed* annuities is a permissable activity for national banks ...." Pet. App. 37a (emphasis supplied).

The defect in VALIC's argument is that its own complaint sought an injunction prohibiting the NationsBank petitioners from "engaging in the sale of fixed and variable

[10] Other states also have construed the incidental powers provisions of their state banking laws in a dynamic manner. *See Corbett v. Devon Bank*, 12 Ill. App. 3d 559, 299 N.E.2d 521 (1973) (upheld power of Illinois banks to engage in renewals of motor vehicle licenses and to receive the statutory fees therefor); *City of Pittsburgh v. Allegheny Valley Bank*, 488 Pa. 544, 555, 412 A.2d 1366, 1372 (Pa. 1980) (concurrence of Flaherty, J.) ("[T]he official comment [on the incidental powers clause] states: 'The provision covers a *wide range and variety of activities* in which institutions engage as part of the conduct of their banking business and is intended to cover other activities in which institutions may engage in the future.'" (Emphasis in original.))

annuities." VALIC Compl. ¶ 3, R. 0150. NationsBank raised as an issue before the district court, and argued extensively as an alternative defense, that even if the Comptroller's Approval were not upheld, the right to sell at least variable annuities must be upheld under the Glass-Steagall Act.[11] NCNB Defendants' Memorandum in Support of Their Motion for Summary Judgment, filed August 20, 1991 at 19-28, R. 0433-42. VALIC also raised the Glass-Steagall issue in its papers. Plaintiff's Memorandum in Support of Its Motion for Summary Judgment, filed May 10, 1991 at 5-6, R. 0104-05. Given the disposition of the District Court, it was not required to reach the issue. On appeal, VALIC did not raise Glass-Steagall authority in its opening brief, although NationsBank did urge in its brief that the district court's judgment should be affirmed on the ground that the Glass-Steagall Act "provides a separate and independent basis of authority for annuity sales." Brief of NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc., filed May 18, 1992, at 28-29. The Court of Appeals ignored the issue.

VALIC's strained effort to maintain that Glass-Steagall Act authority is not fairly presented by this case is belied by the scope of the questions presented by both petitioners in these consolidated cases, Fed. Pet. at i, NationsBank Pet. at i (the Glass-Steagall Act is part of 12 U.S.C. § 24(7), which is referenced in both questions presented), and by the statement appearing in our Petition, *id.* at 4 n.3 ("[T]he issue of whether annuities are securities which may be brokered by national banks under the express powers

[11] NationsBank relied, in part, on the reasoning reflected in a line of Comptroller staff interpretive letters. OCC Ltr. No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) 84,501, at 77,773 (Apr. 4, 1985); OCC Ltr. No. 415, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,639, at 78,000 (Feb. 12, 1988); OCC Ltr. No. 429, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,653, at 78,032 (May 19, 1988).

granted national banks under the [Glass-Steagall Act] is directly at issue in this case.")

VALIC's only attempt at a substantive response to the Glass-Steagall Act basis for national bank authority to sell annuities is its contention that all the annuities which NationsBank proposed to sell should properly be deemed fixed annuities. VALIC bases this on its assertion that all annuities offered by NationsBank contain a fixed option and that, therefore, somehow none of the annuities being offered would be Glass-Steagall securities.[12] VALIC Br. 32, 48. Factually, VALIC is without support in the record.[13] NationsBank's notice to the Comptroller sought approval to offer the annuities of various issuers having various fixed and variable accumulation options, including annuities under which the contract owners would "be permitted to direct that premium/investment payments accumulate solely in a variable account." Admin. R. at 7 (certified on July 30, 1991), R. 0013. NationsBank's notice was broadly worded so as to permit the sale of a wide range of annuity products.

Moreover, even if the contracts offered customers a combination of fixed and variable features or options, that fact would not *ipso facto* require that they be characterized as fixed annuities and, in turn somehow deemed not to

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[12] Even fixed annuities may be Glass-Steagall securities. In a case involving VALIC, the Seventh Circuit has held that certain fixed annuities were securities required to be registered under the Securities Act of 1933, 15 U.S.C. § 77a *et seq. Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127 (7th Cir. 1986) (opinion on rehearing), *cert. denied*, 486 U.S. 1026 (1988).

[13] VALIC is similarly without support in the record for its statement that "NationsBank has not proposed to sell term certain annuities." VALIC Br. 31 n.16. Because NationsBank's application to the Comptroller sought authority to sell every form of commercially available annuity contract, term certain annuities and other types of annuities which did not use a mortality calculation were approved for sale and, in fact, have been sold by NationsBank.

constitute securities within the meaning of the Glass-Steagall Act. The folly of this reasoning is demonstrated by the annuity contract at issue in *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), oddly relied upon by VALIC in support of its contention. VALIC Br. 32, 48. The terms of the annuity contract in that case provided that during the accumulation period premiums would accumulate in a "Flexible Fund," the major part of which was invested in common stocks. However, the contract purchaser would be guaranteed a certain specified minimum return upon maturity regardless of the performance of the "Flexible Fund." 387 U.S. at 205-08. The annuity contract, therefore, possessed precisely the fixed return feature in the accumulation period that VALIC contends should result in the characterization of the entire contract as a fixed annuity. Yet, this Court had "little difficulty in concluding" that the accumulation portion of this contract "does not fall within the insurance exemption of § 3(a) of the Securities Act" and that it does constitute an "investment contract" under Section 2 of the Securities Act. 387 U.S. 210-11. This Court, using arguments similar to those used by the Comptroller below, judged the annuity contract in part on the basis of how it was marketed: "Contracts such as the 'Flexible Fund' offer important competition to mutual funds and are pitched to the same consumer interest in growth through professionally managed investment." 387 U.S. at 211 (citation omitted).

The *United Benefit Life* decision, rather than aiding VALIC, provides powerful support for the contention that an annuity contract should be deemed a Glass-Steagall security at least so long as it offers any variable feature or option to the customer. While not dispositive of its classification under the Glass-Steagall Act, the Comptroller has consistently taken the position that classification of an instrument as a security under the Securities Act is "highly relevant" as to its classification under the Glass-Steagall Act. *See* NationsBank Br. 33-34 (authorities collected).

VALIC's contention that the presence of any fixed feature or option renders the entire contract "insurance" was clearly rejected in *United Benefit Life*. 387 U.S. at 207. This holding was reaffirmed last term in *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 527-28 & n.13 (1993).

While the Glass-Steagall Act provides an alternative basis for reversal of the judgment below, this Court, of course, need not reach the issue if the Comptroller's Approval is upheld. If, however, this Court were to overturn in whole or in part the Comptroller's Approval, and the Court determines not to reach the Glass-Steagall Act issue, at minimum NationsBank would be entitled to a remand on this issue.

II. SECTION 92 IS NOT A LIMIT ON THE POWER OF NATIONAL BANKS TO SELL ANNUITIES WHEREVER LOCATED.

In order to prevail on its contention that 12 U.S.C. § 92 ("Section 92") bars national banks from selling annuities, VALIC must establish both of the two fundamental propositions in its brief. First, VALIC must demonstrate that the legislative origins of Section 92 and application of the maxim of *expressio unius* demonstrate that Congress did not intend national banks to be able to sell any insurance products. VALIC Br. 11-16. Second, VALIC must prove that the Comptroller could not have rationally concluded that annuities were not insurance. VALIC Br. 16-35.

Contrary to VALIC's contentions, neither the legislative history of Section 92 nor, more importantly, its actual language states that national banks may not sell any insurance products. In contending that the Comptroller could not have rationally determined that annuities were not insurance, VALIC incorrectly states that there is unanimity in the academic community on the issue and slights the numerous authorities referenced by the Comptroller. In addition, VALIC makes no attempt to refute the underlying functional analysis used by the Comptroller in concluding that annuities are purchased primarily as financial investments by "[i]nvestors . . . seeking a guaranteed, long-term return on their assets." Pet. App. 38a. Even if VALIC had presented a plausible basis for disagreeing with the Comptroller's decision as to the "insurance" status of annuities, it has clearly failed to demonstrate that the Comptroller's determination was "unreasonable" or otherwise impermissible, as VALIC must in order to prevail. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992).

A. The Text and Legislative History of Section 92 Do Not Establish That Congress Intended to Prohibit National Banks From Selling Annuities As Agent.

While VALIC references a number of cases in which the maxim of *expressio unius est exclusio alterius* was used by this Court as a tool of statutory construction, all of those cases differ from the present one in at least one critical respect. Unlike the statutes being construed in those cases, Section 92 by its very terms provides that the power being granted thereby is "*in addition to* the powers now vested by law in national banking associations . . ." (emphasis added). The application of the *expressio unius* maxim in this case is vitiated by the express language of Section 92. VALIC's proposed application of *expressio unius* would, in effect, read the "in addition to" language out of Section 92.

In any event, even if it were apposite, this Court has "treated the maxim '*expressio unius est exclusio alterius*' as but an aid to construction," *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 n.8 (1943), and has treated the maxim as "subordinate" to other relevant indicia of legislative intent. 320 U.S. at 350-51. A number of courts have stated that the "maxim is to be applied with great

caution and is recognized as unreliable." *Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Bethelehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982); *see also National Petroleum Refiners Ass'n v. Federal Trade Comm'n*, 482 F.2d 672, 676 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *Bruce v. Lumbermens Mut. Casualty Co.*, 222 F.2d 642, 645 (4th Cir. 1955). VALIC's effort to apply this maxim mechanically despite explicit statutory language that the powers granted by Section 92 are supplemental to powers granted elsewhere in the National Bank Act is totally without merit. Accordingly, it can be rejected without in any sense slighting those cases where the maxim may have proved an aid to determining legislative intent.

VALIC also attempts to rely upon the legislative background of Section 92 as support for its contention that national banks lack any "insurance agency powers." VALIC Br. 12. However, VALIC's so-called references to the "legislative genesis" of Section 92 are not references to primary sources of legislative history, such as congressional debates or committee reports with respect to the proposed legislation. Instead, VALIC relies upon a letter written by an attorney at the Federal Reserve Board published in the Federal Reserve Bulletin[14] and a letter from Comptroller Williams to Senator Robert L. Owen. VALIC Br. 12-13. Both letters contain only very ephemeral references to insurance agency activities by national banks. Comptroller Williams' letter refers at most to the type of general insurance agency activities that Section 92 proposed to permit national banks to engage in in small towns. Neither letter addresses the sale of any specific product of an insurance company or any specific insurance agency activity. These two documents, therefore, are not dispositive authority with respect to the sale by national

[14] Indeed, VALIC presents no evidence that this letter was even presented to Congress during its consideration of proposed Section 92.

banks of annuities or of specialized insurance-related products.

Moreover, VALIC cannot dispute that the courts have consistently interpreted Section 92 as not prohibiting the sale as agent of all insurance-related products. *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468, 476-77 (8th Cir. 1984) (upheld order permitting sale of credit-related property and casualty insurance); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1169-71 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) (held that credit life insurance is a "limited special type of coverage" that "in no way" involved the "operations of a general life insurance business"). Similarly, the Comptroller has approved the sale of a number of specialized insurance-related products. *See* NationsBank Br. 46-47.

B. The Comptroller Had a Substantial and Well-Reasoned Basis For His Conclusion That Annuities Were Not Insurance for Purposes of Section 92.

VALIC seeks to establish that when Congress used the term "insurance" in Section 92 it meant annuities irrespective of any functional analysis of the modern-day features of this financial investment product. As support, VALIC relies heavily upon insurance texts, many of which are over a hundred years old. While it may have been appropriate for the authors of these texts to discuss both annuities and life insurance for certain purposes, VALIC substantially distorts and overstates the opinions expressed by these authors when it states: "Insurance scholars largely agree that annuities are insurance . . . ." VALIC Br. 18.

Indeed, a more complete review of insurance texts quoted by VALIC and a number of major texts *not* quoted leads to the conclusion that the following view is at least as representative among modern insurance scholars as the contrary view: "Annuities are not simply a form of life insurance; in fact, they are the opposite of insurance." Allen L. Mayerson, *Introduction to Insurance* 414 (1962).

Accord Frank Joseph Angell, *Insurance* 607 (1959) ("An annuity is the *reverse* of life insurance.") (emphasis in original); Fedrick G. Crane, *Insurance Principles and Practices*, 251 (2d ed. 1984) ("[A life annuity] is the opposite of insurance."); Herbert S. Deneberg, *Risk and Insurance* 287 (1974) ("Annuities are often viewed conceptually as the converse of life insurance."); S.S. Huebner and Kenneth Black, Jr., *Life Insurance* 118 (8th ed. 1972) ("From an economic standpoint life insurance and annuities have been regarded as vastly different from one another."); William R. Vance, *Handbook on the Law of Insurance* 1020 (3d ed. 1951) ("The common form of annuity is entirely different from a life policy."); Charles O. Hardy, *Risk and Risk Bearing* 286 (2d ed. 1931) ("[The life annuity] contract is exactly the reverse of the insurance contract.")

Similarly, a number of the authorities cited by VALIC as supporting its position actually contain other statements that draw fundamental distinctions between annuities and insurance. *See, e.g.*, Vance, *supra*, 88 ("It is generally held that an annuity contract is not a contract of insurance but the insurance laws generally regulate the issuance of annuities and the consideration received for the contract is taxed by many states."); Crane, *supra*, 251; Kenneth Black, Jr. and Harold D. Skipper, Jr., *Life Insurance* 147 (12th ed. 1994) ("Annuities remain exceedingly popular as a means of personal savings in the United States .... This enhanced popularity reflects the continuing aging of the U.S. population and the concomitant desire to increase savings in a tax-favored vehicle in anticipation of retirement financial needs.").

VALIC repeatedly states that the purpose of an annuity contract is to provide funds to the contract purchaser at a later point in life. VALIC Br. 18, 20, 21, 22, 26-27, 30-31. As such, an annuity contract is fundamentally indistinguishable from many other financial investments, such as stocks, mutual funds, or zero coupon bonds. This characteristic is in marked contrast to the primary purpose of

a life insurance policy, which is to provide proceeds to those who suffer a loss by reason of an insured's death. While a mortality *calculation* is sometimes used to structure an annuity payout, that method of payout is used less frequently today and is in no sense essential to the function and purpose of an annuity.[15]

By contrast, the pooling of mortality *risk* is the essence of a life insurance contract. Every life insurance policy pays a benefit in the event of the insured's death prior to maturity. While a life insurance contract may have an investment component, as in the case of a whole life policy, that component is not essential to the insurance. VALIC is, therefore, unconvincing in its contention that an annuity contract is essentially an "insurance" contract, at least as the latter term is generally understood.

The courts have similarly concluded in a variety of different contexts that annuities do not constitute insurance for particular purposes. *See, e.g., Helvering v. Le Gierse*, 312 U.S. 531, 542 (1941) (under federal tax law which excludes "amounts receivable as insurance" from decedent's gross estate for tax purposes, annuities are not treated as insurance); *Estate of Keller v. Commissioner*, 312 U.S. 543 (1941) (accord); *In re Sothern's Estate*, 257 A.D. 574, 14 N.Y.S.2d 1 (1939) (annuity contracts are not, within New York tax law exemption, applicable to insurance payable to a designated beneficiary from estate taxes); *In re Rhodes' Estate*, 197 Misc. 232, 94 N.Y.S.2d 406 (N.Y.

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[15] VALIC contends that whenever a contract uses a mortality calculation to structure a payout at maturity, such a contract constitutes insurance. VALIC Br. 33. A wide range of contracts frequently provide for payments to be made for life. For example, businesses many times agree to pay employees and their spouses retirement benefits for life. Similarly, individuals entitled to receive a lump sum payment frequently elect to structure such payment in the form of a fixed stream of payments over life. While these contracts may require mortality calculations and perhaps some pooling of mortality risk by the party agreeing to make payment, these contracts are generally not viewed by the parties as "insurance."

Surr.Ct. 1949) (accord); *In re Walsh*, 19 F. Supp. 567 (D. Minn. 1937) (annuity policy owned by bankrupt was not within insurance exemption to Minnesota bankruptcy law and therefore trustee in bankruptcy was entitled to the cash surrender value of the policies); *In re Howerton*, 21 Bankr. 621, 623 (1982) (accord); *Carroll v. Equitable Life Assurance Co.*, 9 F. Supp. 223 (W.D. Mo. 1934) (defendant, a mutual insurance company forbidden by law to issue insurance contracts except by a "mutual plan," was nonetheless authorized to sell annuity contracts without a mutual plan because annuity contracts are investments rather than insurance); *Succession of Rabouin*, 201 La. 227, 9 So. 2d 529 (1942) (insurance is not considered part of the decedent's estate for purposes of the law of "forced heirship," but annuities are part of the estate because they are not insurance).

Even considered in their most favorable light, VALIC's contentions do not establish that the Comptroller acted unreasonably when, consistent with a long line of judicial authority and numerous secondary authorities distinguishing between insurance and annuities, he concluded that annuities were not insurance for purposes of Section 92. At the very most, VALIC demonstrates that some, but certainly far from all, academicians and other authorities may view annuities as insurance for certain purposes and that the States may regulate annuities as insurance for some (but not all) purposes. These facts clearly are not dispositive of this case. It is illustrative that VALIC's flawed contentions have been advanced by the insurance industry in this Court in prior cases under other federal statutes and have been rejected. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *SEC v. United Benefit Life Ins. Co.*, *supra*; *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, *supra*. This Court found these arguments unpersuasive at that time and they should again be rejected now.

C. The Comptroller's Approval Is Not a Reversal of a Prior Formal Agency Position.

VALIC states that in 1978 "the Comptroller ruled that a national bank's proposal to broker annuities" violated Section 92. VALIC Br. 4; *see also* VALIC Br. 16-17. As is shown in our Brief, this statement seriously mischaracterizes what was an informal, unpublished letter of a staff member stating "my opinion [of] an arrangement of the kind that you describe . . . ." VALIC Opp. to Cert. App. 1a. Since no formal Comptroller's ruling occurred in 1978, the Comptroller's Approval in this case is not a reversal of a prior formal agency position. VALIC Br. 17.[16]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: October 11, 1994

[16] While both the Comptroller and NationsBank cite certain published interpretive guidance prepared by the Comptroller's staff, neither petitioner has contended that, if the Comptroller were to rule differently from a staff member in another case, such a Comptroller ruling would represent a reversal of the Comptroller's position. *Cf.* OCC Banking Circular No. 205, *reprinted in* [1984-1985 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,314, at 90,973 (July 26, 1985) (staff no-objection positions "should not be regarded as precedents binding on the Comptroller .... [and] would not constitute official action by the Comptroller").